Supreme Court No. 84379-1

Court of Appeals No. 62711-2-I
(Consolidated Number)



SUPREME COURT OF
OF THE STATE OF WASHINGTON

In the Matter of the
GUARDIANSHIP OF SANDRA LAMB

James R. Hardman and Alice L. Hardman, Guardians
Petitioners

v.

State of Washington
Department of Social & Health Services

Respondent.

# PETITIONERS' SUPPLEMENTAL BRIEF

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## INTRODUCTION

The denial and reduction of compensation for guardians chills guardianship advocacy at a time when budget cuts and news reports impel more, not less, guardian supervision of care providers and their residents. A fully compensated guardian protects the health, safety, and civil rights of incapacitated persons. This protection should not be sacrificed for reductions or denials of compensation by the very agency which has custody of the vulnerable adults for whom advocacy is undertaken.

## STATEMENT OF FACTS

Sandy Lamb and Rebecca Robins (Sandy and Rebecca) are profoundly intellectually disabled. They are nonverbal and cannot express preferences on abstract subjects in any way. Their cognitive development was arrested prior to language acquisition. There intellectual development ages are approximately 24-36 months.

Sandy and Rebecca are both residents of Fircrest School, a residential habilitation center (RHC) under state law. CP 21, 110. Sandy was born in 1956 and is now is 54 years old. CP 115. She is a person with profound intellectual disability. CP 115. She is a person with multiple disabilities including limited speech and articulation, mild microcephaly, hearing loss, and hemiplegia. CP 115. Rebecca was also

born in 1956 and is also a person with profound intellectual disability. CP 26. She is a person of no speech, autism, microcephaly, self-injurious behavior and aggression. CP 26. Both have lived at Fircrest for many years. Rebecca was admitted in 1984, CP 7, and Sandy in 1964, CP 101.

James R. Hardman, J.D., C.P.G. and Alice L. Hardman, M.S.W., C.P.G. are full Co-Guardians of the Person and Estate with independent authority. CP 56, 150. There were no opposing declarations. Sandy's and Rebecca's guardians provide advocacy. Advocacy includes education of legislators, DSHS officials, local governments and community groups. The predominant advocacy in the case consists of defending Sandy's and Rebecca's best interests from proposals of others. The goal is to (a) ensure a stable home and a successful health care delivery system and (b) prevent potential harm or death.

The unique facts: (i) State government is the ultimate decision-maker concerning Sandy's and Rebecca's home and health care delivery system at this type of facility, (ii) no traditional, publicly funded disability rights organization represent their interests, (iii) known instances of death and injury from DSHS implementation of prior proposals exist. Other advocacy concerned activities of a health lab, including storage of radioactive and biological materials near the living units at the facility and

potential changes in traffic intensity from changes in land use on the facility grounds. Sandy's and Rebecca's guardians have expertise concerning the type of facility and the residents there. They received advance authorization from the court to engage in these activities.

DSHS objected generally to the authority of a guardian to advocate to legislative and executive officials, local governments and community groups, raising a host of Medicaid and state law issues. DSHS claims Sandy's and Rebecca's guardians were not entitled to compensation because the advocacy was not necessary. Reasonableness is not disputed.

Sandy's and Rebecca's guardians filed reports describing in detail tasks provided. The Guardians' Report for Rebecca was filed and approved in 2008. CP 20-54, 58-59. Sandy's Guardians' Report was also filed an approved in 2008. CP 109-146, 148-49. Each Report is sworn and attaches an "Advocacy Report of James R. Hardman" for the period through February 2008. CP 39-54, 130-45. Additional filed documents include a Supplement Report, CP 188-90, a Declaration of James R. Hardman regarding his hourly rate, CP 192-95, and a Guardians' Supplemental Declaration regarding Ongoing Advocacy Activities, CP 192-195. The Guardians' requested an advance fee allowance in the monthly amount of $350.00 for the next three-year reporting period. DSHS offered no factual declarations.

The King County superior court commissioner agreed with Sandy's and Rebecca's guardians, approving the Reports and authorizing an advance allowance of fees of $350 per month for all guardianship activities for the upcoming reporting period. CP 58-59, 148-49. The superior court on the DSHS motion for revision reversed, determining as a matter of law a guardian does not have the power to engage in legislative or executive advocacy yet does so with respect to community groups and organizations. CP 226-28, 234, 236. Sandy's and Rebecca's guardians' Motion for Reconsideration was denied. CP 289-92. Notices of Appeal and Cross-Appeal were timely filed.

The Court of Appeals affirmed the superior court, but on alternative grounds, determining (i) the record did not adequately show Sandy's and Rebecca's guardians are entitled to compensation; (ii) attorney fees before the trial court could not be awarded because unique issues were in play; and, (iii) attorney fees on appeal could not be awarded because the Sandy's and Rebecca's guardians did not prevail. This Court granted review.

**STANDARD OF REVIEW**

Ultimately, the Court's duty is to protect Sandy's and Rebecca's best interests. *Seattle-First National Bank v. Brommers*, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977). This Court reviews the superior court's

decision, not the court commissioner's. *State v. Hoffman*, 115 Wn.App. 91, 101, 60 P.23d 1261 (2003). The case was decided on guardians' reports and declarations submitted. De novo review of the record is therefore appropriate. See *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990). *De novo* review of the record is appropriate because this case concerns Sandy's and Rebecca's best interests and the exercise of their civil and Constitutional rights.

## ANALYSIS

### I. The Court Should Reject the "Direct Benefit"Test Adopted by the Court of Appeals Because it Has no Statutory or Case Law Support, and Instead Adopt a Best Interests Standard of Compensation.

#### A. Standards of Compensation: Background.

Predictable and stable standards of compensation are desirable. Compensation (or fees) for fiduciaries, including guardians, are usually paid from the "estate" being administered. Court approval of fees from the estate is justified by review of (a) entitlement and (b) reasonableness of amount. The issue here relates solely to entitlement.

Entitlement is often defined by different terms and phrases -- "just", "beneficial" or "benefit", "necessary", "just" or prudent. See, e.g., RCW 11.92.180 ("just and reasonable"). Case law also defines entitlement. A guardian is entitled to fees for performing his or her duties

absent significant wrongdoing. *In re Montgomery's Estate*, 140 Wash. 51, 53, 248 P. 64 (1926). In dealing with trust estates, a fiduciary must show the fees are necessary (actual services performed in relation to the duties owed). See *In re Powell's Estate*, 68 Wn.2d 38, 411 P.2d 162 (1966). A reduction or denial of fees is justified by reference to unfulfilled duties that are not trivial and not prejudicial.[1]

The term "direct benefit" or "substantial benefit" or "benefit" or "beneficial" concerns financial estates where an increase or decrease in property or value to an investment occurs. See, e.g., *Allard v. Pacific National Bank*, 99 Wn.2d 394, 663 P.2d 104 (1983) (trusts); *Estate of Niehenke*, 117 Wn.2d 631, 818 P.2d 1324 (1991) (probate estates); *Guardianship of McKean*, 136 Wn.App. 906, 151 P.3d 223 (2007) (guardianship estates). An increase in the amount of an investment, or an addition of a newly found asset to the estate, is easy to describe and plain to see. In a guardianship of the estate, conferring such a benefit plainly serves the "best interests". However, the Court of Appeals opinion is the first published case to apply the "direct" benefit rule to a guardianship of the person and is impossible to apply, is impractical and will lead to more

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[1] Disallowance of fees is, costs or expenses to a trustee who has not fulfilled his full duty is not by way of penalty, but the purpose of a court of equity is to preserve trust funds and prevent injury to the cestui. *Tucker v. Brown*, 20 Wn.2d 740, 150 P.2d 604 (1944).

litigation.

The Court of Appeals relied on *McKean* for the proposition, but *McKean* is concerned with guardian fee entitlement in the context of recovery of money or property to the estate. The Court of Appeals did not explain (and DSHS has still not explained) why a "direct" benefit rule should be expanded to guardians of the person. There is no basis for expanding the rule of estates to human beings.

### B. Practical Reasons Dictate a Benefit Rule Should Not be Applied as a Rule of Reduction or Denial in Guardianships of the Person.

Guardians of the person have different duties than guardians of the estate. Applying a "direct" benefit rule, or even a generic benefit rule, is impractical and simply does not fit the responsibilities of a guardian of the person.

First, people are not property. Guardians are not direct caregivers or direct medical or residential providers. They are monitors, decision-makers and advocates. How does one describe an increase or decrease in the value of one's person and what does it look like? How does one prove causality? How does one prove causality is direct? The Court of Appeals provided no guidance on these points. It is not practical to apply.

Second, the application of bright line rules to guardianship practice is often impractical. Three examples: (1) A guardian incurs time

developing a residential plan which fails through no fault of the guardian. Such a plan provides no benefit because it was unsuccessful but was necessary and prudent and was reasonably believed to serve best interests. (2) A guardian spent time arranging for a recreational or therapeutic music plan. This provides a benefit to the individual's emotional well-being and serves best interests but arguably is not necessary. (3) A guardian spent time analyzing potential medical treatment and weighing benefits vs. risks in the context of providing an informed consent decision. However, after the decision is made, some intervening event makes the treatment unnecessary, or the treatment itself is not working. There is no "direct" benefit but obviously informed consent decisions are necessary and well within the realm of guardianship duties and powers. See, e.g., *In re Guardianship of Hamlin*, 102 Wn.2d 810, 689 P.2d 1372 (1984).

We also do not know what the Court of Appeals meant by a "direct" benefit. Is this the causality or nexus between the decision-making or advocacy and a successful result, one without intervening or superseding cause? If so, is there any better case of direct benefit conferred than advocacy directed at preventing death and harm to the person and ensuring the person's continuity of a stable home and successful medical care delivery system?

Or did the Court of Appeals really mean that a "direct" benefit is

one that never confers an incidental benefit to others? In the financial estate context, where one beneficiary causes a recovery or increase in the value of the entire estate, that singular beneficiary is entitled to *pro rata* contribution by the other beneficiaries measured by the undivided interest each has in the estate (or common fund). *Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed 1184 (1939). The analogy does not hold for Sandy and Rebecca. A co-beneficiary to a common fund has an underlying legal entitlement. But persons other than the guardians' wards have no such cognizable right to the advocacy of the guardians in this case. The guardians in this case are not guardians for every resident, only their wards.[2]

Receipt of an incidental benefit by third persons is not a reason to reduce or deny compensation. A simple example is the time incurred by a guardian to price and procure a wide screen television for one resident in a living unit where 5 other individuals will have the benefit of watching it. Since the others have no entitlement to watch, they are not co-

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[2] The trial court's prior approval of the advance allowance of $350 per month contemplated total time divided by the total number of wards on a monthly basis after a considerable discount. Sandy's and Rebecca's guardians understand they must allocate individualized tasks to the particular ward, and divide the time which benefits all wards by the total number of clients. DSHS never objected to the reasonableness of the amount of the fee on this or any other basis.

beneficiaries with an interest in the wide screen television and are not required to contribute to the time incurred for the guardian to purchase it. Nor is it practical to require a contribution from those receiving an incidental benefit. How would such an incidental benefit be calculated or required? Others may receive an incidental benefit from advocacy, but that is no basis to reduce or deny compensation for the benefit received by Sandy and Rebecca.

The Court of Appeals did not address why a "direct" benefit rule should be extended to guardianships of the person. This Court should reject the "direct" benefit test and apply a best interests test instead.

### C. The Court Should Apply a Best Interests Standard of Compensation for a Guardianship of the Person.

As discussed later, Sandy's and Rebecca's guardians in this case are not officious intermeddlers volunteering their services for free, or self-serving violators of their duties or morally wrong simply by asking for compensation for good work done. Rather, the best way to measure a guardian's performance of duties as a guardian of the person is to refer to the person's best interests.

A best interest standard is an appropriate standard of compensation in this case. Necessity, benefit, and prudence are subsets of the broader concept of best interests. A showing the advocacy was necessary, or

beneficial, or prudent, is necessarily in the best interests. If only one of these narrower standards is imposed, the guardian will have acted in best interest, but not be compensated to the extent of the duty owed, as in the medical treatment consent example. The best interest standard is also consistent with the general rule in *Montgomery*.

The following analysis shows the advocacy in this case was necessary, beneficial, prudent and serves the best interests. "Best interests" is not defined in statute or case law but its plain meaning should prevail. It is highly dependent on the facts and circumstances of each case. The following non-exclusive factors guide guardians in making a determination that the best interests are served.

(1) Relevant decision-making standards apply. The guardian owes a duty to act in the best interests by statute and by the relevant standards of practice. *Guardians' Opening Br.*, at 6-13. In the Medicaid context, the State must administer programs like Fircrest School in the "best interests" of Sandy and Rebecca. 42 U.S.C. § 1396a(a)(19). There is no evidence that the advocacy is inimical to the best interests of Sandy and Rebecca.

(2) The guardian exercises discretion determining whether the best interests are served. The guardian owes a primary duty to the incapacitated person, and secondarily to the supervising court. Courts follow the guardian's discretion absent significant wrongdoing. *In re*

*Rohne*, 157 Wash. 62, 288 P. 269 (1930); see also *Brommers*, 89 Wn.2d at 200 (guardian is officer of the court and court is superior guardian). The guardian with the court's assistance serves Sandy's and Rebecca's best interests. Thus, a guardian's objectively reasonable belief that the best interests have been served is a significant factor (and there is no evidence to the contrary in this case). See *Guardians' Response to DRW's Motion to Appear as Amicus Curiae in Support of DSHS and Guardians' Response to DRW's Amicus Curiae Brief.*

(3) Is the advocacy necessary? The advocacy is necessary because it addresses circumstances related to the guardian of the person. Most importantly, Sandy's and Rebecca's guardians owe a duty to advocate under the circumstances. *Guardians' Opening Brief*, at 6-13. Maintaining and preserving life and health in the context of proposed changes to the stability of one's home or care delivery system or local land use changes is necessary. The advocacy is also necessary because of the lack of the ability of self-advocacy and the lack of traditional disabilities rights advocates.

(4) Is the advocacy beneficial? As discussed earlier, a benefit rule does not fit because guardians do not provide direct care services to the person. However, a direct or substantial benefit is provided by preserving a successful and stable home life, ensuring bodily integrity in the context

of a care delivery system or local land use changes.

(5) Is the advocacy prudent? Every legislative session amounts to an unlawful detainer proceeding in that it may result in the Sandy's or Rebecca's eviction. This happened to Sandy in 2003 and resulted in an Abuse of Vulnerable Adults case (under Chapter 74.34 RCW) culminating in her return to Fircrest School and the award of damages. Prevention of risk of significant harm or death is superior to litigation.

(5) What is the nature and extent of the advocacy? The following describes why advocacy is important in this particular case:

(a) what are the needs of the IP? Sandy and Rebecca have pervasive care needs and are non-verbal. They cannot self-advocate and need the assistance of a guardian with respect to all their needs.

(b) what is the environment in which the IP lives, and what is the environment of those who will decide matters pertaining to those needs? Sandy and Rebecca are in the custody of DSHS and cannot count on DSHS to advocate on their behalf. They are almost if not completely dependent on DSHS for care. Unlike other residential settings provided or supervised by DSHS, no other traditional advocates are available or willing to represent Fircrest residents. Media representation of guardians is generally negative. Guardian dissent is punished by DSHS -- this litigation is an example of that. Disempowering guardians disempowers

incapacitated persons.

(c) what remedies are available to the incapacitated person? Without guardian advocacy, Sandy and Rebecca have no remedy and no ability to assert their civil and Constitutional rights. The right to petition is a cornerstone of our Nation. Sandy and Rebecca interests are entitled to the same Constitutional right to be heard, regardless of political unpopularity. One is hard pressed to argue or to suggest that the exercise of Constitutional rights in general and the right to petition in particular are futile acts in our democratic society.

(d) what effort is the most likely be effective in the context-specific environment? Communication to facility staff is effective for some advocacy issues. Other advocacy is most likely to be effective when directed to the Legislature which is the ultimate decision-maker on large issues, to executive officials who make recommendations regarding those legislative decisions, to DSHS who implements those decisions, see *Parsons v. DSHS*, 129 Wn.App. 293, 118 P.3d 930 (2005), review denied, 157 Wn.2d 1004 (2006)[3], to community organizations who influence those issues, and to municipal governments who determine land use issues.

The Court of Appeals was wrong to find that a direct benefit is

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[3] But see RCW 71A.16.030 (consent of guardian provision).

required. Its entire analysis of the case under this standard is flawed.

Statutes imposing duties on guardians should be interpreted to avoid a Constitutional violation of Art. I, § 4 of the Washington Constitution and the First and Fourteenth Amendments of the United States Constitution. See,e.g., *Tunstall v. Bergeson*, 141 Wn.2d 201, 5 P.3d 691 (2000). See *Guardians' Opening Br.* at 38-47; see also *Brief of Amicus Curiae American Civil Liberties Union of Washington.*

The Court of Appeals should be reversed.

## II. DSHS's Suggested Gratuitous Intent Rule Should be Rejected Because it Cannot Be Equitably Applied and Existing Rules on Compensation Are Already Adequate.

### A. A Gratuitous Intent Rule for Certified Professional Guardians Should be Rejected.

DSHS generally supports more restrictive rules on guardian compensation and now invites the Court to extend a gratuitous intent rule to certified professional guardians. DSHS cites cases where family members who live with their wards should not be compensated for care-giving services which would otherwise be provided for free and asks that the rule be extended to Sandy's and Rebecca's guardians in the context of advocacy. *DSHS Response Brief and Opening Brief on Cross-Appeal,* at 14-16.

DSHS seriously misperceives what a guardian's responsibilities

entail. There is no factual or equitable basis in this case to expand the rule and create a new theory applying it to all decision-making and advocacy of guardians. Sandy's and Rebecca's guardians do not live with their wards. They are not family members or care-givers. They monitor DSHS, the care-giver and medical services provider. Sandy's and Rebecca's guardians did not "volunteer" for decision-making and advocacy services. Decision-making and advocacy is based on appointment as guardian of the person. Statutes and other authority recognize and require protection of an incapacitated person's civil rights. Decision-making and advocacy of personal care needs and the exercise of the Sandy's and Rebecca's civil rights by guardians are well-established in federal or state law.[4] The new

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[4] See, e.g., 42 U.S.C. sec. 1396r(c)(1)(c) (rights of Medicaid recipients shall be exercised by person appointed under state law); RCW 70.129.040(3) (rights of nursing facility residents shall be exercised by person appointed under state law); *"Appendix J, Survey Procedures and Interpretive Guidelines for Intermediate Care Facilities with Mental Retardation"*, TAB W 125 (identifying an ICF/MR Facility Practice (which if violated can result in citation and withholding of federal funds: "A personal advocate or legally sanctioned surrogate decision-maker has been identified, and is encouraged to assist/support the individual in exercising these rights.") Federal regulations also impose a duty on ICF/MR providers, including the State of Washington, to allow and encourage individual clients to exercise their rights. 42 C.F.R. § 483.420(3). Finally, the Washington Constitution imposes a "second" paramount duty on the State to foster and support institutions for the developmentally disabled and in tandem with federal and state law make the Guardians' exercise of civil rights unique to RHC residents. Wash. Const., Art. XIII.

theory sabotages guardianship protection for persons in DSHS care or supervision by characterizing advocacy as "volunteer" work that should be done for free. The very reason we are here is because the Sandy's and Rebecca's guardians are asking for their entitlement to compensation -- there is no evidence the guardians intended to provide advocacy for free. Suggesting the rule that applies to family guardians who provide services in the home should apply to professional guardians who advocate on behalf of residents of Fircrest School is baseless in fact and law, and lacks practical sense.

### B. Existing Rules of Reduction and Denial of Compensation are Adequate.

The general rules of compensation adequately provide rules of reduction or denial of fees for significant wrongdoing. Wrongdoing is significant when it is more than trifling and has prejudicial effect. Though DSHS suggests Sandy and Rebecca are not entitled to advocacy, amicus Disabilities Rights Washington (DRW) alleges Sandy's and Rebecca's guardians appear to be "self-serving" because they requested compensation for their services. See *Disability Rights Washington's Amicus Curiae Brief in Support of [DSHS's] Response and Cross-Appeal*, at 14-18.

Guardians have a variety of fiduciary duties such as the duty to

preserve property, but we are not dealing with management of financial estates here. Guardians also have a duty to be prudent and duty of loyalty to not engage in self-dealing. Self-dealing involves dealing with the financial estate in such a way as to benefit the fiduciary or the fiduciary's family or the fiduciary's interest in a corporation or the like.

DRW does not profess to be an expert on guardianships. Yet DRW complains in part that Sandy's and Rebecca's guardian compensation results in an appearance of self-dealing. *Id.*, at 17. However, self-dealing does not include payment of compensation to oneself from the guardianship estate. If that were true every guardian who writes a check to him or herself from the guardianship estate -- which is every certified professional guardian -- is self-serving (or appears to be). This also appears to sleight certified professional guardians as if there is some wrong motive or intent inferred from a request for compensation. The desire to make a living and request compensation for services is not self-serving in the legal sense or in the real world and the DRW use of the term is purely pejorative rather than helpful.

In any event, Sandy's and Rebecca's guardians in this case never administered a guardianship estate. They did not abscond with funds from the guardianship estate or invest them in a way to obtain any interest which is in conflict with their duty to Sandy and Rebecca. Allegations that

Sandy's and Rebecca's guardians are self-serving in this case because they request compensation for their services are unnecessary ad hominem attacks.

On one hand DSHS claims Sandy's and Rebecca's guardian's advocacy is motivated by gratuitous intent and should be denied compensation. On the other hand, DRW says that advocacy is motivated by self-dealing. It is neither. Both DSHS and DRW do not want Sandy's and Rebecca's guardians compensated because they disagree with the content of the advocacy. DSHS and DRW oppose Sandy's and Rebecca's civil rights.

## III. This Court Has No Jurisdiction to Decide the Statutory Issues Raised by DSHS Because DSHS was Never a Proper Party in the Trial Court and the Court Does Not Take Cognizance of Issues of Misuse of Funds by a Representative Payee.

Counsel in a guardianship case owes a duty of candor to the Court, and therefore discloses here a jurisdictional issue affecting review. Issues of subject matter jurisdiction and personal jurisdiction of DSHS in this case preclude review of most if not all of the financial and Medicaid issues.

### A. Lack of Subject Matter Jurisdiction.

The application of the "direct" benefit test, advocacy as a legitimate duty, and Sandy's and Rebecca's right to petition remain as

viable issues. However, the application of RCW 11.92.180 and all the Medicaid and other rules raised before the Court of Appeals no longer appear to apply in this case.

None of these issues remain in play in this case because of a change of circumstances. Sandy's and Rebecca's guardian James R. Hardman has been appointed as representative payee. Any issue DSHS may have over a representative payee's use or alleged misuse of funds should be addressed to the Social Security Administration. *Guardianship Estate of Keffeler v. DSHS*, 151 Wn.2d 331, 88 P.3d 949 (2004). RCW 11.92.180 applies to guardianship estates, not to representative payees. The social security benefit is not legally available to DSHS because social security benefits are not subject to court process directed at those benefits. 42 U.S.C. §§ 407(a),(b). There is no longer jurisdiction or controversy over the application of RCW 11.92.180.

**B. Lack of Personal Jurisdiction over DSHS.**

Though DSHS appeared and started the litigation in this and 9 other cases, the trial court did not obtain personal jurisdiction over Fircrest School as representative payee, or over DSHS as the agency administering Medicaid services.

The parties-in- interest in a guardianship case are the guardian and the incapacitated person. The proceedings in a guardianship case are

concerned with this relationship. Generally, a representative payee must be joined as a party either by the representative payee's motion to intervene or the guardian's motion to join in order for binding orders to ensue. In particular, DSHS is required to serve the guardian of the estate with a Notice and Finding of Financial Responsibility before personal jurisdiction is obtained in the guardianship estate. This never happened, as described further below.

Though Sandy's and Rebecca's guardians provided notice to DSHS under Chapter 388-79 WAC, actual delivery of papers does not confer personal jurisdiction. RCW 4.28.080. DSHS is not a party to these proceedings.

### C. Sandy's and Rebecca's Guardian James R. Hardman Reasonably and Objectively Believed DSHS was Misusing Funds and Applied to be Representative Payee.

Sandy's and Rebecca's guardian James R. Hardman reasonably and objectively believed that DSHS was misusing the funds by depositing them in the General Fund rather than actually applying them to cost of care, and that such a disposition of funds is inimical to Sandy's and Rebecca's best interests. Sandy and Rebecca are entitled to services regardless of payment of cost or care or the ultimate disposition of those funds, which is a unique circumstance for RHC residents. Federal regulations prefer a guardian over any care providers for representative

payee status. Federal policy requires guardians for residents of Fircrest. Under all these circumstances, the Guardian applied to be representative payee to replace DSHS as representative payee.[5] The Guardian's decision was objectively reasonable and he exhausted administrative remedies pursuant to *Keffeler*. The independence of the discretion of the representative payee from the guardianship of the estate occurs regardless who is the representative payee. When DSHS was representative payee, such benefits were not part of the estate. Now that the Guardian is now representative payee, the same is true. DSHS is unjustifiably alarmed.[6]

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[5] The representative payee will "zero out" the account monthly, pay the personal allowance into resident trust account, pay guardian and attorney fees, and pay the balance into the resident trust account. When the balance in the resident trust account exceeds $2,000, those funds are automatically deposited into the General Fund.

[6] In a case recently in Pierce County, DSHS appeared before the court without filing any papers or any appearance, announced it was disinterested in the outcome but had "concerns", provided legal argument which the court accepted over the objections of counsel, with the ultimate result being Mr. Hardman's removal as guardian. The court determined that Mr. Hardman's appointment as representative payee required prior court approval and was self-serving, even though there was no finding of misuse of funds. There is no rule requiring court approval. This will be appealed. This is the 10th case in which DSHS is litigating against indigent Medicaid recipients, albeit with very questionable procedures.

**D. Assuming Without Agreeing the Court Has Jurisdiction, the Court Should Deny Relief to DSHS Because DSHS Has Not Established Liability for Financial Responsibility and Statutory Reductions of Compensation are Not Actually Applied to Cost of Care.**

Assuming (without agreeing) the court has jurisdiction to decide the applicability of RCW 11.92.180 for the stage of proceedings under review, there are two reasons to deny relief to DSHS.

FIRST, it is undisputed DSHS has not established liability for financial responsibility participation in cost of care pursuant to RCW 43.20B.430 and -.435 . The payment of financial responsibility is not established and not "required" within the meaning of RCW 11.92.180. RCW 11.92.180 (as well as RCW 43.20B.460 and Chapter 388-79) simply do not apply because DSHS never perfected its claim to financial responsibility. Sandy and Rebecca cannot be discharged for nonpayment of cost of care, and eligibility cannot be conditioned on payment of cost of care. 42 U.S.C. § 1396a(a)(17)(d). Even if financial responsibility was established, other statutes may condition their financial claim. See, e.g., RCW 71A.20.100, WAC 388-835-0350. Though the Court of Appeals stated the general proposition that Sandy and Rebecca are "required" to pay cost of care, in this case no liability was ever established. There is nothing in the record showing personal jurisdiction was obtained or liability established.

SECOND, statutory reductions in guardian and counsel fee compensation subsidize the General Fund and are not actually applied to cost of care. Sandy and Rebecca get guardian and legal services for free. The General Fund gets the equivalent value in cash from the social security benefit. The guardian and counsel's labor indirectly subsidizes the General Fund with such equivalent value. This result is inequitable and inconsistent with the general standard of compensation as well as the trial court's discretion to award fees to the extent of the duty absent significant wrongdoing.

We have these complications because the Legislature inserted itself into the business of performing review of guardian and counsel fees, a function traditionally within the inherent discretion of the trial court. The statutes should be construed to prevent an unconstitutional violation of the separation of powers doctrine. *Guardians' Opening Br.* at 32-38.

## IV. The Court Should Order Payment of Attorney Fees and Costs by DSHS

Sandy's and Rebecca's guardians seek a determination that they are entitled to an award of attorney fees, costs, and expenses in the trial court and on appeal to be paid by DSHS pursuant to RCW 11.96A.150 and RAP 18.1 and for the reasons described in the *Guardians' Opening Br.*, at 48-50. Sandy and Rebecca are each indigent and do not have

taxing authority. The "prevailing party" standard, though a consideration in an award of fees under RCW 11.96A.150, is not an exclusive standard according to the plain meaning of the statute. Contingency fees are not contemplated. The same reasoning applies to the "unique issues" standard. And recall it is DSHS who litigated and raised those issues in 10 different cases so far of Fircrest clients. Sandy's and Rebecca's guardians were obligated to defend. Their counsel fees should be paid.

**RELIEF REQUESTED**

Sandy and Rebecca through their guardians respectfully request the Court:

1. Reverse the Court of Appeals on its application of the "direct" benefit standard for guardian fees and the "prevailing party" and "unique issues" standards for attorney fees.

2. Find that advocacy is a legitimate activity of a guardian of the person under the facts and circumstances of this case, and determine that the best interest standard is the most appropriate standard of compensation for a guardian of the person.

3. Determine that counsel for Sandy's and Rebecca's guardians are entitled to payment of attorney fees, expenses and costs by DSHS, and remand the issue of the reasonableness of the fees to the trial court.

4. Grant such other relief as the Court deems just and equitable.

October 25, 2010

Respectfully submitted,

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